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Supreme Court, U.S.
FILED
OCT 26 1999
OFFICE OF THE CLERK

No. 99-47

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

GABRIEL RUVALCABA
Petitioner,

vs.

CITY OF LOS ANGELES and *DARYL F. GATES*, Chief of Police, in his personal and official capacity etc., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR PETITIONER
3435 Wilshire Boulevard, Ste. 2900
Los Angeles, CA 90010
(213) 252-9444

9 pp

QUESTIONS PRESENTED

1. Where a city police officer, in a "bifurcated" trial, claims that his conduct was objectively reasonable under the Fourth Amendment because he followed city policy and practice, and the jury returns a verdict in favor of the officer, is the plaintiff entitled to go forward on his *Monell* claim against the entity, and to prove that the policy or practice the officer relied on is unconstitutionally unreasonable?

2. Should a city police officer, in a "bifurcated" trial, be permitted to rely on his following city policy or practice to show that his actions were objectively reasonable under the Fourth Amendment?

3. Where a city police officer, in a "bifurcated" trial, relies on his following city policy and practice to show that his actions were reasonable, should the plaintiff be permitted to show that city policy and practice is not reasonable?

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I. CONTRARY TO RESPONDENTS' CLAIM, THE RECORD CLEARLY ESTABLISHES THAT PETITIONER HAS NOT BEEN AND WILL NOT BE COMPENSATED FOR HIS DOG BITE INJURIES IF THE NINTH CIRCUIT'S DECISION IS ALLOWED TO STAND.

A central tenet in respondents' opposition is that petitioner has been "fully compensated for *all* of his injuries" (emphasis added). Hence, even if the dog handler Coon did rely on a following policy defense, the issue became moot given the jury's award of damages and the Ninth Circuit's disposition. Opposition brief, pp. 10, 13-14.[1]

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[1] For example, respondents argue:

> Ultimately, the entire argument that Coon mounted an improper defense [of following policy] was proved moot in light of the fact that the jury returned a verdict in petitioner's favor and found that Coon violated his constitutional rights.

Inexcusably, respondents misstate the record. Petitioner has *not* been "fully compensated for this injuries"; he was *never* awarded *any* damages for his police dog bite injuries, a fact that the Ninth Circuit readily acknowledged. The $65,400 damages award was for injuries caused by Coon kicking and hitting petitioner *only*:

> We note that Ruvalcaba's victory may be a hollow one because on remand, he may no longer seek compensatory damages. Such damages are unavailable because Ruvalcaba has already been fully compensated for his injuries attributable to Officer Coon's kicks and blows. *No compensatory damages were awarded for Ruvalcaba's dog bite injuries because the jury found that they did not result from the use of excessive force.* The fact that Officer Coon's kicking may have been the result of an unconstitutional dog-bite policy does not change the jury's finding, and would not justify allowing additional damages for the dog bites.
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> * * * *
>
> Here, it was clear from the jury's answers to the special interrogatories that the jury awarded damages to Ruvalcaba only for his kicking injuries because only the kicks constituted the excessive force.

Ruvalcaba v. City of Los Angeles, 167 F.3d 514, 524 (9th Cir. 1999) (see Petition for Certiorari, Apx. A20) (emphasis added).

Thus, had the court of appeal agreed with petitioner that the

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Opposition brief at 10.

verdict in Coon's favor on the release of the dog could not exonerate respondents (because Coon asserted a following policy defense), on remand petitioner could seek additional compensatory damages against respondents. The Ninth Circuit's remand, however, does not permit recovery for the dog bite injuries because, even though petitioner contended that Coon asserted a following policy defense and respondents were responsible for that policy, this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986), requires that respondents escape liability for the dog bite injuries:

> [Ruvalcaba] argues that the special interrogatories did not decide the issue whether he suffered constitutional injuries due to Officer Coon's use of his dog, because the jury might have found Officer Coon's actions reasonable because he was following departmental policy. The Supreme Court, however, has flatly rejected such an argument . . .
>
> In this case, as in *Heller*, the jury was not instructed on qualified immunity or good faith, and is presumed not to have based its decision that Officer Coon's use of the dog did not constitute excessive force on those grounds. *Id.*

Ruvalcaba, *supra*, 167 F.3d at 523 (see Petition for Certiorari, Apx. A18-A19).

If, as petitioner contends, the Ninth Circuit has mis-read *Heller* (Petition for Certiorari, pp. 9-13), then petitioner may seek compensation from the City and Gates for the dog bite injuries. Rather than making the issue moot, the court of appeal's disposition (remanding case but precluding recovery for the dog bite injuries) makes ripe the issues petitioner raise.

II. THE PETITION DOES NOT SEEK OR REQUIRE THE RESOLUTION OF DISPUTED FACTS; ONLY AN ISSUE OF LAW IS RAISED.

Petitioner's central thesis is that a municipality and its policymaker should not escape liability for a constitutionality-defective policy because their subordinate employee, after defending his conduct on grounds he did what he was trained to do, was exonerated. While one who follows policy may be forgiven for that reason, e.g., *Wilson v. Layne*, ___ U.S. ___, 119 S.Ct. 1692, 1700, 143 L.Ed.2d 818 (1999), that ought not to shield those who set the policy.

Respondents do not contest the merits of that proposition. Rather, they insist that the "evidence in this case does not support" petitioner's "factual hypothesis," *i.e.*, that Coon defended his release of the dog on grounds it was in accordance with respondents' policy. E.g., Opposition brief, pp. 5-6. Respondents then offer a self-serving and inaccurate summary of the facts as if it proves Coon did not defend his conduct on grounds his release of the dog was in accordance with LAPD policy. Opposition brief, pp. 1-4, 6-8.

It is unnecessary for this Court to decide whether respondents have fairly summarized the record (they have not[2]). The core issue is

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[2] For instance, the jury quite plainly disbelieved Coon's claim that he did not kick or hit petitioner, concluding instead that he had and had done so maliciously – jury awarded damages after finding that Coon had either kicked or struck petitioner, an award that included $5,000 in *punitive* damages. *Ruvalcaba*, 167 F.3d at 519-20. This verdict was also a rejection of the claim that another officer accidently injured petitioner by landing on him with his knee. Opposition brief, pp. 3-4.

Respondents' assertion that Coon did not rely on a following policy defense, Opposition brief at 6-7, finds no support in the Ninth Circuit's decision. No where in its opinion does that court suggest that Coon did not rely on following policy defense. Furthermore, the trial judge explicitly acknowledged that Coon was relying on a following police defense. In discussing petitioner's proposed jury instruction which would have precluded Coon from justifying his conduct on

a strictly a legal question, to wit: are municipal policymakers, based on *Heller*, shielded from liability where the officer defends his conduct by claiming he did what the policymakers trained him to do? The Ninth Circuit said yes. If the court of appeals was wrong, it made an error of law. In that case, this Court's procedure is to resolve the legal question and remand to the lower court to apply the law to the case's facts. *Merchants' National Bank v. Richmond*, 256 U.S. 635, 638, 41 S.Ct. 619 (1920) (Court holds that it would address the legal question even though the lower courts had not passed upon the evidence or made factual findings; Court decides the legal question, reverses judgment and remands for further proceedings). In that event, respondents will be free to convince the court of appeals that Coon did not invoke a following policy defense.

III. CONCLUSION.

The petition raises an important and fundamental question. May policymakers escape a jury's scrutiny because it concludes the officer acted reasonably by following the policymakers' policy? The Ninth Circuit says yes. That, petitioner submits, offends basic notions of fairness and will probably insure immunity for policymakers in bifurcated cases:

> If we conditioned municipal liability on an individual police officer's liability in every case, it might lead to illogical results. A municipality would escape liability whenever the conduct of the acting police officer did not meet the "shocks the conscience" standard, even though municipal policymakers, acting with deliberate indifference or even malice,

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grounds he followed department policy, the trial court stated: ***"there is certainly evidence in the record that would support the giving of such an instruction if it's a correct statement of the law . . . ."*** RT V-149:4-10.

> implemented a policy which dictated his injury-causing actions. It is easy to imagine a situation where an improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because his conduct did not "shock the conscience." It does not follow, however, that the city should also escape liability. The city causes the officer to deprive the plaintiff of his liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights.

Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3rd Cir. 1994).

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioner